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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JUNE WISNIEWSKI,) 3:11-cv-00621-LRH (WGC)

Plaintiff,)

vs.)

VITUS GROUP, INC., et. al.,)

Defendants.)

**REPORT & RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. §(b)(1)(B) and Local Rules of Practice, LR IB 1-4.

Before the court is Plaintiff's Application to Proceed in Forma Pauperis (Doc. # 1)¹, and First Amended Complaint (Doc. # 5).

I. APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

A person may be granted permission to proceed in forma pauperis if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1). "[T]he supporting affidavits [must] state the facts as to the affiant's poverty with some particularity, definiteness, and certainty." *United States v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (per curiam) (citing *Jefferson v. United States*,

¹ Refers to court's docket number.

1 277 F.2d 723, 725 (9th Cir. 1960)). The litigant need not “be absolutely destitute to enjoy the
 2 benefits of the statute.” *Adkins v. E.I. du Pont De Nemours & Co.*, 335 U.S. 331, 339 (1948).

3 In her application, Plaintiff states she receives Social Security Disability, and has no
 4 other income. (Doc. # 1 at 1.) She has \$25.00 either in cash or in a checking or savings
 5 account. (*Id.* at 2.) Her only listed asset is a 2000 Honda Civic hatchback which she values at
 6 approximately \$1,300. (*Id.*) Her expenses include: (1) \$317 per month in rent; (2) \$140 per
 7 month for utilities; (3) \$150 per month for car insurance, maintenance, and gas; (4) \$100 per
 8 month in medical expenses; and (5) \$150 per month in food and miscellaneous items. (*Id.*)
 9 Plaintiff has debts in the amount of \$1,335. (*Id.*)

10 While the court cannot ascertain Plaintiff’s precise ability to pay the filing fee based on
 11 the information contained within her application because she does not identify the amount
 12 of Social Security Disability she receives, the court finds it is unlikely Plaintiff would be able
 13 to pay the \$350 filing fee given that she only has \$25 in cash or in a checking or savings
 14 account, and taking into account the amount of Plaintiff’s monthly expenses and existing debt.
 15 Therefore, Plaintiff’s application to proceed in forma pauperis should be granted.

16 **II. SCREENING**

17 **A. Standard**

18 Applications to proceed in forma pauperis are governed by 28 U.S.C. § 1915, which
 19 “authorizes the court to dismiss an IFP action that is frivolous or malicious.” *Franklin v.*
 20 *Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984) (citing 28 U.S.C. § 1915(a) (citing 28 U.S.C. §
 21 1915(d)). This provision applies to all actions filed in forma pauperis, whether or not the
 22 plaintiff is incarcerated. *See Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc);
 23 *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam).

24 28 U.S.C. § 1915 provides: “the court shall dismiss the case at any time if the court
 25 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim
 26 upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is
 27 immune from such relief.” 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). Dismissal of a complaint for

1 failure to state a claim upon which relief may be granted is provided for in Federal Rule of
 2 Civil Procedure 12(b)(6), and the court applies the same standard under Section 1915(e)(2)
 3 when reviewing the adequacy of a complaint or amended complaint. Review under Rule
 4 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232
 5 F.3d 719, 723 (9th Cir. 2000).

6 A complaint must contain more than a “formulaic recitation of the elements of a cause
 7 of action;” it must contain factual allegations sufficient to “raise a right to relief above the
 8 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading
 9 must contain something more . . . than . . . a statement of facts that merely creates a suspicion
 10 [of] a legally cognizable right of action.” *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice*
 11 and *Procedure* § 1216, at 235-36 (3d ed. 2004)). In reviewing a complaint under this standard,
 12 the court must accept as true the allegations of the complaint in question, *Hosp. Bldg. Co. v.*
 13 *Trustees of Rex Hosp.*, 425 U.S. 738, 740 (1976), construe the pleading in the light most
 14 favorable to plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395
 15 U.S. 411, 421 (1969). Allegations in *pro se* complaints are held to less stringent standards than
 16 formal pleadings drafted by lawyers, and must be liberally construed. *See Hughes v. Rowe*,
 17 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*); *see also*
 18 *Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011); *Balistreri v. Pacifica Police Dep’t*,
 19 901 F.2d 696, 699 (9th Cir. 1990).

20 **B. Plaintiff’s First Amended Complaint (pp. 1-22)**

21 In her First Amended Complaint, Plaintiff asserts that she resided at Washoe Mill
 22 Apartments in Reno, Nevada, is disabled, and her immune system is unable to filter out toxic
 23 chemicals include formaldehyde and asbestos. (Doc. # 5 at 5.) She asserts various claims
 24 related to renovation work that took place at the apartment complex.

25 Plaintiff names the following Defendants: (1) Vitus Group, Inc. (Vitus), owner of
 26 Washoe Mill Apartments (Doc. # 5 at 5); (2) Washoe Mill Partners, LP, the owner of Washoe
 27 Mill Apartments, and its general partner, Washoe Mill Management, LLC (*id.* at 5-6); (3)

1 Evans Property Management, Inc. (EPMI), the business entity and management company for
 2 Washoe Mill Apartments (*id.* at 6-7); (4) Precision General Commercial Contractors, Inc.
 3 (Precision), the general contractor that did construction work at Washoe Mill Apartments (*id.*
 4 at 7); (5) Lanz Cabinet Shop, Inc. (Lanz), manufacturer and supplier of the kitchen and
 5 bathroom cabinets for Washoe Mill Apartments (*id.*); (6) Rosebud Forest Products Co.
 6 (Rosebud), manufacturer of the wood and particle board shelves used in the kitchen and
 7 bathroom cabinets (*id.*); and (7) Fahrendorf, Viloria, Oliphant, & Oster, L.L.P., and attorney
 8 Roger Doyle (*id.* at 8).²

9 Plaintiff seeks relief under the following theories of liability: (1) reasonable
 10 accommodations for a disability (Fair Housing Act Amendments, 42 U.S.C. § 3604(f), and,
 11 section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794); (2) violation of 24 C.F.R. §
 12 50.3(i)(1); (3) violation of 24 C.F.R. § 5.703; (4) violation of 24 C.F.R. § 3280.309; (5)
 13 violation of 29 C.F.R. § 1926.1101(k); (6) strict liability design defect and failure to warn; (7)
 14 negligence (formaldehyde); (8) negligence (asbestos); (9) fraudulent concealment; (10)
 15 negligent infliction of emotional distress; and (11) miscellaneous state law claims including,
 16 violation of Nevada Revised Statutes (NRS) 118A.360, 118A.500, and 118A.510. (Doc. # 5.)

17 **C. Analysis**

18 **1. Reasonable Accommodations for Disability (42 U.S.C. § 3604(f) and 29
 19 U.S.C. § 794) (pp. 22-25)**

20 **a. Allegations**

21 Plaintiff claims that Defendants Vitus, Washoe Mill Partners, LP, Washoe Mill
 22 Management, LLC, EPMI, and Precision discriminated against her in violation of the Fair
 23 Housing Act Amendments (FHAA), 42 U.S.C. § 3601, *et. seq.*, by failing to make a reasonable
 24 accommodation for her disability. (Doc. # 5 at 22-25.) She also brings a claim under section
 25 504 of the Rehabilitation Act of 1973 (RA), 29 U.S.C. § 794, which requires nondiscrimination

27 ² Plaintiff often refers to "Defendants" instead of targeting a specific defendant in her allegations.
 Therefore, unless otherwise narrowed by Plaintiff, the court's evaluation of the claims focuses on all Defendants.

1 and reasonable accommodation among recipients of federal financial assistance. *See* 29 U.S.C.
 2 § 794.

3 Plaintiff alleges that Defendants knew of her disability yet denied her reasonable
 4 accommodation when they refused to replace the new defective cabinets in her kitchen and
 5 bathroom, and failed to put in a ventilation system to filter out the poisonous air that
 6 supposedly emanated from these cabinets. (Doc. # 5 at 22-24.) Plaintiff asserts that
 7 Defendants are recipients of federal financial assistance, and they intentionally discriminated
 8 against Plaintiff based on her disability by renovating the apartment so as to remove accessible
 9 features and refused to remedy these problems when notified they were in violation of the RA.
 10 (*Id.*)

11 **b. FHAA**

12 An individual may file a civil action for an alleged violation of the FHAA. *See* 42 U.S.C.
 13 § 3613. A cause of action arising under the FHAA applies to the *sale or rental* of housing
 14 provided with federal financial assistance. 42 U.S.C. §§ 3603, 3604.

15 To prevail on a claim under 42 U.S.C. § 3604(f)(3), a plaintiff must prove all of
 16 the following elements: (1) that the plaintiff or his associate is handicapped
 17 within the meaning of 42 U.S.C. § 3602(h); (2) that the defendant knew or
 18 should reasonably be expected to know of the handicap; (3) that accommodation
 19 of the handicap may be necessary to afford the handicapped person an equal
 20 opportunity to use and enjoy the dwelling; (4) that the accommodation is
 21 reasonable; and (5) that defendant refused to make the requested
 22 accommodation.

DuBois v. Association of Apartment Owners of 2987 Kalakaua, 453 F.3d 1175, 1179 (9th Cir.
 23 2006) (citations omitted).

24 Thus, Plaintiff states a colorable claim for violation of 42 U.S.C. § 3604(f)(3) against
 25 Defendants Vitus, Washoe Mill Partners, LP, Washoe Mill Management, LLC, and EPMI. As
 26 to Precision, Plaintiff alleges it was a contractor performing work at the apartment complex,
 27 and therefore would not have been involved in the *sale or rental* of housing to Plaintiff.
 28 (Doc. # 5 at 7.) Accordingly, the FHAA claim should be dismissed as to Precision, with
 prejudice.

29 ///

C. RA

2 An entity that receives federal funds violates the RA if it denies a qualified individual
3 with a disability a reasonable accommodation that the individual needs in order to enjoy
4 meaningful access to the benefits of public services. 29 U.S.C. § 794 (a). In order to state a
5 private cause of action under the RA, a plaintiff must establish that he or she is: (1) disabled
6 within the meaning of the RA; (2) otherwise qualified for the benefit or service sought; (3)
7 subject to discrimination solely by reason of the disability. *See Lovell v. Chandler*, 303 F.3d
8 1039, 1052 (9th Cir. 2002) (citation omitted); *Mustafa v. Clark Count School Dist.*, 157 F.3d
9 1169, 1174 (9th Cir. 1998) (citing 29 U.S.C. § 794(a)). She must also allege the defendant was
10 a recipient of federal funds. *See* 29 U.S.C. § 794 (a).

11 Plaintiff states a colorable claim for violation of the RA against Defendants Vitus,
12 Washoe Mill Partners, LP, Washoe Mill Management, LLC, EPMI, and Precision, whom she
13 asserts were the recipients of federal funds (Doc. # 5 at 24-25).

2. Violation of 24 C.F.R. § 50.3(i)(1) (p. 25)

15 Plaintiff alleges she was denied the right to live in United States Department of Housing
16 and Urban Development (HUD) housing, free from hazardous materials, contamination, toxic
17 chemicals and gasses. (Doc. # 5 at 25.) Specifically, she claims that Defendants added toxic
18 formaldehyde to the property and secretly removed asbestos without notice, thereby denying
19 Plaintiff a safe place to live in violation of 24 C.F.R. § 50.3(i)(1). (*Id.*)

20 This regulation provides:

21 It is HUD policy that all property proposed for use in HUD programs be free of
22 hazardous materials, contamination, toxic chemicals and gasses, and radioactive
23 substances, where a hazard could affect the health and safety of occupants or
conflict with the intended utilization of the property.
24 C.F.R. § 50.3(i)(1)

23 24 C.F.R. § 50.3(i)(1).

24 The regulations set forth at 24 C.F.R. § 50.1, *et. seq.*, implement the policies of the
25 National Environmental Policy Act (NEPA) and other environmental requirements. *See* 24
26 C.F.R. § 50.1(a). “NEPA (42 U.S.C. 4321 *et. seq.*), establishes national policy, goals and

1 procedures for protecting, restoring and enhancing environmental quality." 24 C.F.R. §
 2 50.1(b).

3 However, 24 C.F.R. § 50.3(i)(1) does not appear to give rise to a private right of action.
 4 "[P]rivate rights of action to enforce federal law must be created by Congress. The judicial task
 5 is to interpret the statute Congress has passed to determine whether it displays an intent to
 6 create not just a private right but also a private remedy. Statutory intent on this latter point
 7 is determinative. Without it, a cause of action does not exist and courts may not create one,
 8 no matter how desirable that might be as a policy matter, or how compatible with the statute."
 9 *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (internal citations omitted). "Language
 10 in a regulation may invoke a private right of action *that Congress through statutory text
 11 created*, but it may not create a right that Congress has not." *Id.* at 291 (citation omitted)
 12 (emphasis added). "Thus, when a statute has provided a general authorization for private
 13 enforcement of regulations, it may perhaps be correct that the intent displayed in each
 14 regulation determine whether or not it is privately enforceable. But it is most certainly
 15 incorrect to say that language in a regulation can conjure up a private cause of action that has
 16 not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the
 17 sorcerer himself." *Id.*

18 This regulation merely sets out a HUD policy and environmental guidelines.
 19 Accordingly, this claim should be dismissed. Plaintiff should be given leave to amend to the
 20 extent she can allege a colorable claim under a statute that provides a private right of action
 21 under these facts.

22 **3. Violation of 24 C.F.R. § 5.703 (pp. 25-28)**

23 First, Plaintiff alleges that she was denied the right to live in HUD housing that is
 24 decent, safe, sanitary, and in good repair. (Doc. # 5 at 26.) She claims that Defendants refused
 25 to provide good air quality and proper ventilation and subjected her to toxic air. (*Id.*)

26 Second, she contends that Defendants replaced her old refrigerator with a new defective
 27 refrigerator which they failed to repair, without notice. (Doc. # 5 at 27.) She asserts that the

1 removal of the old refrigerator resulted in the growth of mold, which caused her physical
2 injury. (*Id.*)

3 Third, she asserts Defendants removed an oven range, replacing it with a defective
4 oven. (Doc. # 5 at 27.) She also contends that they broke her toilet, her blinds, and knocked
5 out her phone system. (*Id.*) They also dumped debris into the heater closet, leaving toxic,
6 formaldehyde coated wood chips on the floor and inside drawers. (*Id.*)

7 Plaintiff alleges that this conduct violates 24 C.F.R. § 5.703 as well as the Regulatory
8 Agreement and Declaration of Restrictive Covenants signed on behalf of Vitus and Washoe
9 Mill Partners, LP, with the Nevada Housing Division to comply with the Uniform Physical
10 Conditions Standards and the Americans with Disabilities Act of 1990 (ADA). (Doc. # 5 at 26-
11 27.)

12 HUD housing “must be decent, safe, sanitary, and in good repair,” and owners of HUD
13 Housing “must maintain such housing in a manner that meets the physical conditions set forth
14 in this section in order to be considered decent, safe, sanitary, and in good repair.” 24 C.F.R.
15 § 5.703. However, as stated above, it does not appear that HUD’s implementing regulations
16 confer a private right of action. A violation of HUD’s regulations may, however, assist the
17 court in determining whether a statute that confers a private right of action was violated.
18 Therefore, the claim that Defendants violated 24 C.F.R. § 5.703 should be dismissed. To the
19 extent Plaintiff can allege a colorable violation of a statute conferring a private right of action,
20 Plaintiff should be given leave to amend.

21 Although Plaintiff’s allegations are confusing, she asserts a violation of the ADA, Title
22 II of the ADA states that “no qualified individual with a disability shall, by reason of such
23 disability, be excluded from participation in or be denied the benefits of the services,
24 programs, or activities of a public entity, or be subjected to discrimination by any such entity.”
25 42 U.S.C. § 12132 (Section 202 of the ADA, Title II). Plaintiff has not sued a public entity, nor
26 has she alleged the denial of benefits by a public entity. Therefore, Plaintiff’s ADA claim should
27 be dismissed with prejudice.

1 Insofar as Plaintiff asserts a violation of a regulatory agreement, it is not clear that
2 Plaintiff has a private right of action given she alleges only Defendants Vitus, Washoe Mill
3 Partners, LP, and the Nevada Housing Division were parties to the agreement. Therefore, this
4 claim should be dismissed without prejudice. Plaintiff may amend if she can show the
5 agreement provides her, as a tenant, with a private right of action arising from a violation of
6 the regulatory agreement.

7 **4. Violation of 24 C.F.R. § 3280.309 (formaldehyde) (p. 29)**

8 Plaintiff alleges Defendants failed to give her written warning that materials used on
9 the premises emit formaldehyde, and failed to warn her of the symptoms of exposure to
10 formaldehyde. (Doc. # 5 at 29.)

11 24 C.F.R. § 3280.309 is a regulation promulgated by HUD that governs *manufactured*
12 *home construction* and applicable safety standards. *See* 24 C.F.R. § 3280.1. Plaintiff alleges
13 she lived in an *apartment*, and not a manufactured home. (*See, e.g.*, Doc. # 5 at 4-5.)
14 Accordingly, this claim should be dismissed with prejudice.

15 **5. Violation of 29 C.F.R. § 1926.1101(k) (asbestos removal) (pp. 29-33)**

16 Plaintiff makes various allegations about the impropriety of the asbestos removal at the
17 apartment complex. (*See* Doc. # 5 at 30-32.)

18 29 C.F.R. § 1926.1101 governs the regulation of asbestos exposure in the *workplace*.
19 Plaintiff cannot maintain this claim under the facts alleged in the First Amended Complaint,
20 which involves alleged exposure to asbestos at an *apartment complex*. This claim should be
21 dismissed with prejudice.

22 **6. Strict Liability Design Defect and Failure to Warn (pp. 33-36)**

23 This cause of action is the first of several state law claims Plaintiff asserts. If this court
24 has jurisdiction over the federal claims, as it does herein, the court may exercise supplemental
25 jurisdiction over the state law claims for relief. 28 U.S.C. § 1337 (a); *Acri v. Varian*
26 *Associates, Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997).

1 Plaintiff asserts a claim against “Defendants” for strict liability design defect and failure
 2 to warn in connection with the kitchen and bathroom cabinets, without identifying which
 3 defendant she is targeting in this cause of action. (Doc. # 5 at 33-35.) She also appears to make
 4 a similar claim with respect to the carpet installation. (Doc. # 5 at 33.) Plaintiff claims she
 5 suffered personal injuries as a result of the formaldehyde-containing cabinets, including a
 6 chronic allergic rhinitis infection, skin rash, loss of hair, loss of smell, hearing loss from
 7 sinusitis, dizziness, and memory loss. (*Id.* at 35.) She asserts that she has undergone medical
 8 monitoring and treatment as a result of her exposure. (*Id.* at 35-36.)

9 The Nevada Supreme Court has extended an action for strict liability in tort to all
 10 products. *See Ginnis v. Mapes Hotel Corp.*, 470 P.2d 135, 138, 86 Nev. 408, 413 (Nev.
 11 1970) (citation omitted). A strict products liability action requires a plaintiff to establish:
 12 (1) defendant placed a defective product on the market; (2) the defect caused plaintiff’s
 13 injury; and (3) the defect existed when the product left the hands of defendant. *See Allison*
 14 *v. Merck & Co.*, 878 P.2d 948, 952, 110 Nev. 762, 767 (Nev. 1994)(citation omitted);
 15 *Shoshone Coca-Cola Co. v. Dolinski*, 420 P.2d 855, 858, 82 Nev. 439, 443 (Nev. 1966);
 16 *Ginnis*, 470 P.2d at 138, 86 Nev. at 413 . The proper defendants in strict products liability
 17 cases are manufacturers and distributors. *Id.* (citations omitted) (“Although
 18 manufacturers are not insurers of their products, where injury is caused by a defective
 19 product, responsibility is placed upon the manufacturer and the distributor of the defective
 20 product rather than on the injured consumer.”).

21 A product is “defective,” when it is “dangerous because [it] fail[s] to perform in the
 22 manner reasonably expected in light of [its] nature and intended function.” *Id.* (internal
 23 quotation marks and citation omitted). The defect must also be “unreasonably dangerous.”
 24 *See Lewis v. Sea Ray Boats, Inc.*, 65 P.3d 245, 249, 119 Nev. 100, 107 (Nev. 2003). In
 25 addition, “[a] product may be found unreasonably dangerous and defective if the
 26 manufacturer failed to provide an adequate warning.” *Rivera v. Philip Morris, Inc.*, 209
 27 P.3d 271, 275 125 Nev. 18 (Nev. 2009) (citation omitted); *see also Shoshone*, 420 P.2d at
 28

1 859 (“failure to give proper warning, under all legal theories, renders a product
 2 ‘defective’”). To successfully prove a failure-to-warn case, a plaintiff must produce evidence
 3 demonstrating the same elements as in other strict product liability cases[.]” *Id.* (internal
 4 quotation marks and citation omitted).

5 Plaintiff alleges Defendant Lanz manufactured and supplied the kitchen and
 6 bathroom cabinets to Washoe Mill Apartments. (Doc. # 5 at 7.) She also asserts that
 7 Defendant Rosebud manufactured the wood and particle board shelves that were used in
 8 the kitchen and bathroom cabinets. (*Id.*) Plaintiff states a colorable claim for strict
 9 products liability regarding the cabinets as to Defendants Lanz and Rosebud. Plaintiff does
 10 not state a claim as to Defendants Vitus, Washoe Mill Partners, LP, Washoe Mill
 11 Management, LLC, EPMI, or Precision because they did not manufacture or supply the
 12 products. *See Calloway v. City of Reno*, 993 P.2d 1259, 1272, 116 Nev. 250, 270-271 (Nev.
 13 2000).

14 Plaintiff does not identify the manufacturer or seller of the carpet, and therefore any
 15 claim for strict products liability, based either on the theory that the product itself was
 16 defective or that there was a failure to warn, should be dismissed without prejudice.

17 **7. Negligence (formaldehyde) (pp. 36-37)**

18 Plaintiff asserts “Defendants” (again, without identifying which defendants) had a
 19 duty to manufacture, purchase, and install cabinets that were not toxic, and breached that
 20 duty by installing toxic cabinets with formaldehyde without warning, proximately causing
 21 physical injury. (Doc. # 5 at 36-37.)

22 To state a claim for negligence under Nevada law, a plaintiff must establish: (1) the
 23 defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the
 24 breach was the legal cause of the plaintiff’s injuries; and (4) plaintiff suffered damages.
 25 *Scialabba v. Brandise Construction Co.*, 921 P.2d 928, 930, 112 Nev. 965, 968 (Nev. 1996)
 26 (citation omitted).

27

28

1 Plaintiff states a colorable claim for negligence against Defendants Vitus, Washoe
 2 Mill Partners, LP, Washoe Mill Management, LLC, EPMI, Precision, Lanz and Rosebud.

3 **8. Negligence (asbestos) (pp. 37-39; p. 38 is missing)**

4 Plaintiff alleges “Defendants” negligently exposed tenants to asbestos fibers when
 5 they failed to use protective measures when removing asbestos from the common areas
 6 and apartments. (Doc. # 5 at 37-38.)

7 The elements of a negligence cause of action in Nevada are stated above. It appears
 8 a page is missing from Plaintiff’s First Amended Complaint, so the court cannot discern all
 9 of Plaintiff’s allegations relative to this claim. Moreover, Plaintiff does not identify who
 10 performed the asbestos removal without taking proper protective measures. Therefore,
 11 this claim should be dismissed without prejudice.

12 **9. Fraudulent Concealment (asbestos and formaldehyde) (pp. 39-42)**

13 Plaintiff argues that “Defendants” fraudulently and intentionally concealed that the
 14 cabinets installed in Plaintiff’s apartment contained formaldehyde when they had a duty to
 15 disclose this material fact to Plaintiff. (Doc. # 5 at 38.) She claims this was done with the
 16 intent to defraud Plaintiff, and she would have acted differently had she known the
 17 cabinets contained formaldehyde. (*Id.* at 39.) Plaintiff further alleges that Defendants
 18 concealed other toxic chemicals being used in the renovations, as well as the building
 19 permits for the premises, and the asbestos removal. (*Id.* at 40-42.)

20 “Intentional misrepresentation is established by three factors: (1) a false
 21 representation that is made with either knowledge or belief that it is false or without
 22 sufficient foundation; (2) an intent to induce another’s reliance; and (3) damages that
 23 result from this reliance.” *Nelson v. Heer*, 163 P.3d 420, 123 Nev. 217, 225 (Nev. 2007)
 24 (citation omitted). Plaintiff states a colorable claim for fraudulent concealment of the
 25 formaldehyde in the cabinets against Defendants Vitus, Washoe Mill Partners, LP, Washoe
 26 Mill Management, LLC, EPMI, and Precision.

1 Plaintiff does not assert how she was damaged by any alleged fraudulent
 2 concealment of asbestos removal. Therefore, the claim for fraudulent concealment of the
 3 asbestos removal should be dismissed without prejudice. Plaintiff should be given leave to
 4 amend to allege the element of damages with respect to the asbestos removal.

5 **10. Negligent Infliction of Emotional Distress (pp. 42-43)**

6 Plaintiff alleges that she suffered and continues to suffer from emotional distress as
 7 a result of Defendants' conduct. (Doc. # 5 at 42.) She claims Defendants knew or should
 8 have known of her weak immune system and high sensitivity to chemicals, and history of
 9 cancer. (*Id.* at 42-43.) She has nightmares about two tenants who she claims died from
 10 exposure to toxic chemicals, and her own fear of injury from exposure. (*Id.* at 43.) This
 11 caused Plaintiff to suffer respiratory problems and a skin rash, lack of sleep, restlessness,
 12 and fear of dying. (*Id.*)

13 To the extent Plaintiff asserts a "bystander" theory of negligent infliction of
 14 emotional distress relative to her knowledge that two tenants allegedly died of exposure to
 15 toxic chemicals, this claim must be dismissed because Nevada law requires that Plaintiff be
 16 a close relative to the victim of the accident. *See Grotts v. Zahner*, 989 P.2d 415, 115 Nev.
 17 339 (Nev. 1999) (non-family relationship fails as a matter of law to qualify for bystander
 18 theory); *Crippens v. Sav On Drug Stores*, 961 P.2d 761, 114 Nev. 760 (Nev. 1998).
 19 Therefore, this claim should be dismissed with prejudice.

20 A plaintiff asserting a direct theory of negligent infliction of emotional distress must
 21 establish: (1) defendant owed a duty of care to plaintiff; (2) defendant breached that duty;
 22 (3) the breach was the legal cause of the plaintiff's injuries; and (4) plaintiff suffered
 23 serious emotional distress. *Olivero v. Lowe*, 995 P.2d 1023, 116 Nev. 395 (Nev. 2000).
 24 While there is some question whether Plaintiff's alleged emotional distress was "serious,"
 25 the factual allegations of the First Amended Complaint state a colorable claim under a
 26 direct theory of negligent infliction of emotional distress against Defendants Vitus, Washoe
 27 Mill Partners, LP, Washoe Mill Management, LLC, EPMI, and Precision.

1 **11. NRS 118A.360, 118A.500, and 118A.510 and miscellaneous state law**
 2 **claims** (pp. 43-47)

3 First, Plaintiff alleges a violation of NRS 118A.510. She claims that her lease was
 4 terminated in retaliation for her complaints to OSHA, Nevada Housing Division, Reno
 5 Housing Authority, Freddie Mac, and the Washoe County Health District. (Doc. # 5 at 45.)

6 Plaintiff is asserting a claim for retaliatory eviction, governed by NRS 118A.510,
 7 which prohibits, among other things, a landlord from terminating a tenancy in retaliation
 8 for a tenant's good faith complaint of a housing violation, and provides for the recovery of
 9 actual damages. Nev. Rev. Stat. 118A.510, 118A.390(1). While Plaintiff names the law firm
 10 Fahrendorf, Viloria, Oliphant & Oster, L.L.P., and attorney Roger Doyle, her claim for
 11 retaliatory eviction pertain primarily to her landlord and the property management
 12 company. Therefore, the court finds Plaintiff states a colorable claim for violation of
 13 NRS 118A.510 against Defendants Vitus, Washoe Mill Partners, LP, Washoe Mill
 14 Management, LLC, and EPMI.

15 Second, Plaintiff alleges Defendants violated NRS 118A.500 by making four or more
 16 unlawful entries into Plaintiff's apartment, without proper notice, and by harassing
 17 Plaintiff. (Doc. # 5 at 44.)

18 NRS 118A.500 provides for injunctive relief and the recovery of actual damages in
 19 the event of "unlawful entry or a lawful entry in an unreasonable manner" by a landlord, or
 20 if a landlord "makes repeated demands for entry otherwise lawful but which have the effect
 21 of unreasonably harassing the tenant[.]" Nev. Rev. Stat. 118A.500. Plaintiff therefore
 22 states a colorable claim for violation of NRS 118A.500 against Defendants Vitus, Washoe
 23 Mill Partners, LP, Washoe Mill Management, LLC, EPMI, and Precision.

24 Third, Plaintiff alleges Defendants violated NRS 118A.360, by failing to maintain
 25 her dwelling in a habitable condition. (Doc. # 5 at 44.) Plaintiff states a colorable claim for
 26 breach of the implied warranty of habitability, which is governed by NRS 118A.355 and
 27 NRS 118A.360, against Defendants Vitus, Washoe Mill Partners, LP, Washoe Mill

1 Management, LLC, and EPMI.

2 Finally, Plaintiff alleges that attorney Roger Doyle misquoted the law, engaged in
 3 collusion, conspiracy, and criminal conduct with his clients, in violation of the Nevada
 4 Rules of Professional Conduct. (Doc. # 5 at 46.) Plaintiff surmises that Mr. Doyle's client is
 5 one of the Defendants and asserts that they used his services to commit a crime by hiding
 6 the removal and improper removal and disposal of asbestos. (*Id.*) He also alleges that
 7 Mr. Doyle violated the Code of Professional Conduct by falsifying information on the lease
 8 termination and concealing the fact that asbestos is located in the apartments. (*Id.*)

9 To the extent Plaintiff is asserting a claim based on alleged violation of the Nevada
 10 Rules of Professional Conduct by Roger Doyle, this claim should be dismissed with
 11 prejudice. The ethical rules governing lawyers do not create a private cause of action for
 12 civil damages. *See Mainor v. Nault*, 101 P.3d 308, 321,120 Nev. 750, 769 (Nev. 2004). To
 13 the extent Plaintiff asserts that Roger Doyle or any other defendant engaged in criminal
 14 conduct, those allegations are not properly part of a civil complaint for damages, and
 15 should be dismissed. Accordingly, Fahrendorf, Viloria, Oliphant, & Oster, L.L.P., and
 16 attorney Roger Doyle should be dismissed from this action without prejudice, as Plaintiff
 17 fails to state any claim upon which relief may be granted against them.

18 **III. RECOMMENDATION**

19 **IT IS HEREBY RECOMMENDED THAT:**

20 (1) Plaintiff's requests to proceed in forma pauperis (Doc. # 1) should be
 21 **GRANTED.** The Clerk of the Court should be instructed to **FILE** the First Amended
 22 Complaint (Doc. # 5). The movant herein should be permitted to maintain this action to
 23 conclusion without the necessity of prepayment of fees or costs or the giving of security
 24 therefor. The order granting in forma pauperis status should not extend to the issuance of
 25 subpoenas at government expense;

26 (2) Plaintiff should be allowed to proceed with her claim under the FHAA, 42 U.S.C.
 27 § 3604(f)(3), against Defendants Vitus, Washoe Mill Partners, L.P., Washoe Mill

1 Management, LLC, and EPMI;

2 (3) Plaintiff's claim that Defendant Precision violated the FHAA, 42 U.S.C. §
3 3604(f)(3), should be **DISMISSED WITH PREJUDICE**;

4 (4) Plaintiff should be allowed to proceed with the claim of violation of the RA, 29
5 U.S.C. § 794(a), against Defendants Vitus, Washoe Mill Partners, L.P., Washoe Mill
6 Management, LLC, EPMI, and Precision;

7 (5) Plaintiff's claim for violation of 24 C.F.R. § 50.3(i)(1) should be **DISMISSED**
8 **WITHOUT PREJUDICE**. Plaintiff should be given leave to amend to the extent she can
9 allege a colorable claim under a statute that provides a private right of action under these
10 facts;

11 (6) Plaintiff's claim for violation of 24 C.F.R. § 5.703 should be **DISMISSED**
12 **WITHOUT PREJUDICE**. To the extent Plaintiff can allege a colorable violation of a
13 statute conferring a private right of action under these facts, Plaintiff should be given leave
14 to amend;

15 (7) To the extent Plaintiff asserts a claim under the ADA, it should be **DISMISSED**
16 **WITH PREJUDICE**;

17 (8) Insofar as Plaintiff asserts a violation of a regulatory agreement, this claim
18 should be **DISMISSED WITHOUT PREJUDICE**;

19 (9) Plaintiff's claim that Defendants violated 24 C.F.R. § 3280.309 should be
20 **DISMISSED WITH PREJUDICE**;

21 (10) Plaintiff's claim that Defendants violated 29 C.F.R. § 1926.1101 should be
22 **DISMISSED WITH PREJUDICE**;

23 (11) Plaintiff should be allowed to proceed with her claim for strict products liability
24 design defect and failure to warn regarding the cabinets as to Defendants Lanz and
25 Rosebud. This claim should be **DISMISSED WITH PREJUDICE** as to Defendants
26 Vitus, Washoe Mill Partners, LP, Washoe Mill Management, LLC, EPMI, and Precision;

27 (12) Plaintiff's claim of strict liability regarding the carpet installation should be

1 **DISMISSED WITHOUT PREJUDICE;**

2 (13) Plaintiff should be allowed to proceed with her claim for negligence
3 (formaldehyde) against Defendants Vitus, Washoe Mill Partners, LP, Washoe Mill
4 Management, LLC, EPMI, Precision, Lanz and Rosebud;

5 (14) Plaintiff's claim for negligence related to asbestos removal should be

6 **DISMISSED WITHOUT PREJUDICE;**

7 (15) Plaintiff's claim for fraudulent concealment of the formaldehyde in the cabinets
8 should be allowed to proceed against Defendants Vitus, Washoe Mill Partners, LP, Washoe
9 Mill Management, LLC, EPMI, and Precision;

10 (16) Plaintiff's claim for fraudulent concealment of the asbestos removal should be

11 **DISMISSED WITHOUT PREJUDICE;**

12 (17) To the extent Plaintiff asserts a bystander theory of negligent infliction of
13 emotional distress, this claim should be **DISMISSED WITH PREJUDICE**;

14 (18) To the extent Plaintiff asserts a direct theory of negligent infliction of emotional
15 distress, this claim should be allowed to proceed against Defendants Vitus, Washoe Mill
16 Partners, LP, Washoe Mill Management, LLC, EPMI, and Precision;

17 (19) Plaintiff should be allowed to proceed with her claim for violation of NRS
18 118A.510 against Defendants Vitus, Washoe Mill Partners, LP, Washoe Mill Management,
19 LLC, and EPMI;

20 (20) Plaintiff should be allowed to proceed with her claim for violation of NRS
21 118A.500 against Defendants Vitus, Washoe Mill Partners, LP, Washoe Mill Management,
22 LLC, EPMI, and Precision;

23 (21) Plaintiff should be allowed to proceed with her claim of breach of the implied
24 warranty of habitability under NRS 118A.355 and NRS 118A.360 against Defendants Vitus,
25 Washoe Mill Partners, LP, Washoe Mill Management, LLC, and EPMI;

26 (22) Plaintiff's claim based on alleged violation of the Nevada Rules of Professional
27 Conduct by Fahrendorf, Viloria, Oliphant, & Oster, L.L.P., and attorney Roger Doyle,

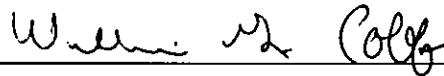
1 should be **DISMISSED WITH PREJUDICE**;

2 (23) Plaintiff's claims of criminal conduct should be **DISMISSED WITH**
3 **PREJUDICE**;

4 (24) Failing to state any claim upon which relief may be granted as to Fahrendorf,
5 Viloria, Oliphant, & Oster, L.L.P., and attorney Roger Doyle, these defendants should be
6 **DISMISSED WITHOUT PREJUDICE**;

7 (25) Plaintiff is advised that pursuant to Local Rule 15-1, if she chooses to file a
8 second amended complaint, it shall be complete in itself without reference to any previous
9 complaint. Plaintiff should be given thirty (30) days from the date of the order adopting
10 the Report and Recommendation within which to file a second amended complaint
11 remedying, if possible, the defects in the First Amended Complaint explained above. Any
12 allegations, parties, or requests for relief from prior papers that are not carried forward in
13 the second amended complaint will no longer be before the court. Plaintiff is cautioned
14 that if she fails to file a second amended complaint within the time period specified above,
15 the action will proceed on the First Amended Complaint, and only with respect to those
16 claims which the court allows to proceed. Plaintiff shall clearly title the second amended
17 complaint as such by placing the words "SECOND AMENDED COMPLAINT" on page 1 in
18 the caption, and plaintiff shall place the case number, **3:11-CV-00621-LRH-WGC**, above
19 the words "SECOND AMENDED COMPLAINT" in the space for "Case No."

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21 DATED: November 1, 2011.

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26 UNITED STATES MAGISTRATE JUDGE
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